impeached was concurred in by one whose conduct in the respect I have mentioned was free from blame, and who was under no similar pressure, the case assumes, I think, a different complexion".

In the present case, the overall value given by the Appellant was actually concurred in by P.W. 2 and to a large extent by P.W. 1 and P.W. 3. Also this is a criminal case and fraud must be proved even more strictly than in a civil action for deceit. Can it be said that the Appellant was guilty of fraudulent intent in what he did?

He put in a figure which was slightly too low according to the experts, but he said that he hoped it would be accepted, and, if not, he would accept the Customs valuation.

Was that necessarily evidence of fraudulent intent on his part? People who are taking goods through the Customs do not in the ordinary way tend to put on them a higher value than they need. In this case the value had got to be something of an estimate by reason of the falling market. To show the difficulty, if P.W. 1, P.W. 2 and P.W. 3, the experts in the trade, were correct, then the 2 Customs Officers placed a value ($1.50 per yard) on the goods that was considerably too high. The market admittedly was, and had been for some time, a falling one and was, therefore, somewhat uncertain. At least one of the Prosecution experts (P.W. 2) agreed completely with the Appellant and the other 2 cloth dealers (P.W. 1 and P.W. 3) very largely agreed with the value he gave.

Should he then, in all the circumstances of the case, be held guilty of the crime of attempting fraudulent evasion of customs duties?

It was suggested by the Prosecution that the Appellant's conduct and remarks when he was being questioned were evidence of a guilty mind. I am of opinion that, taken as a whole, they do not go further than to show that he was confused. I do not agree with the learned District Judge that they showed there was an attempt to deceive the Customs.

On the facts of the case as a whole, and applying the principles laid down in *Derry v. Peek*, I have come to the conclusion that the case was not proved against the Appellant and accordingly I allow the appeal and set aside the conviction.

The order for forfeiture of the goods seized will be rescinded.

Appeal Allowed.

CHONG FONG SHEN v. CHAN PHOOI HOONG.

[Orig. Civil Juris. (Willan, C.J.) April 28, 1947]

Japanese Judgments and Civil Proceedings Ordinance, 1946, Section 3 (4)—Application to set aside a Japanese decree.

In this case the applicant applied to set aside a Japanese decree dated the 8th day of November 1943. This decree was a consent order following a purported settlement between the plaintiff and defendant in the case. It appeared that the parties to the Civil Suit in which the decree was made, both of whom had instructed and were represented by Counsel, were called into Chambers by Mr. Benjamin, who was then officiating as a Judge, without their Counsel being available to them, when terms of settlement were discussed and decided upon. Eventually a consent order was made not by Mr. Benjamin, as was stated in the decree, but by a Japanese Judge, Mr. Toda. According to the affidavit of Counsel for the defendant in the Japanese Civil Suit (the applicant in the case) it appeared that he only agreed to the consent order proposed by Mr. Toda because he was afraid of what would happen to himself and the plaintiff if he did not consent.

Held, (1) that there were irregularities in the hearing of the Japanese Suit in question in this case as the parties had been deprived of the services of their counsel at an important stage of the case and as the consent order was not in fact an order made by the Judge, by whom it purported to be made;

(2) that these irregularities were sufficient grounds for setting aside the Japanese decree under Section 3 (4) (d) of the Japanese Judgments and Civil Proceedings Ordinance 1946; and

(3) that the consent given to the making of the Japanese decree was in fact involuntary and that this was sufficient ground under Section 3 (4) (a) of the Japanese Judgments and Civil Proceedings Ordinance to set aside the decree.

Case referred to :—

(1) *Moscati v. Lawson* (1835) 1 M. & Rob. 454.

Rajendra for Applicant.

Ramani for Respondent.

ORIGINATING MOTION.

Willan, C. J. :—This is an application under section 3 of the Japanese Judgments and Civil Proceedings Ordinance, 1946, to set aside a Japanese decree dated the 8th day of November, 2603 (1943) in Civil Suit No. 18 of 2603 (1943)—hereinafter in this judgment referred to as "the Civil Suit"—instituted in the Court of a Judge at Kuala Lumpur. By subsection (4) of that section a Japanese decree may be set aside on any of the following grounds :—

(a) that it was obtained as a result of such force, injury or detriment to any party to the proceedings or other person, or such threat thereof, as, in the opinion of the appropriate Court, was sufficient to render the action of the party in relation to the proceedings involuntary;

(b) that any necessary party did not appear personally but was represented by any person appointed by any Japanese authority;

(c) that it was based on principles unknown to the existing laws; or

(d) on any other ground which the appropriate Court considers to be sufficient.

The Civil Suit was for the dissolution of a partnership business, and the Applicant and Respondent to this Application were respectively the plaintiff and defendant in that suit. The Japanese decree sought to be set aside is a consent order following a purported settlement between the said plaintiff and defendant. The applicant prays that this consent order be set aside on the following grounds :—

(i) That the merits of the case had not been heard and disposed of by the Court in accordance with law.

(ii) That the settlement the subject of the consent order was not a final settlement but was the outcome of improper pressure exercised by the Japanese Judge, Mr. Toda, and agreed to out of fear by the Applicant.

(iii) That it was made on principles unknown to existing laws.

The Civil Suit came on for hearing on the 5th of November, 1943, before Mr. Benjamin, a local Advocate and Solicitor, who had been appointed to officiate as a Judge by the Japanese authorities. It was part heard on the 5th and 6th November, 1943, and then adjourned to the 8th of November, 1943, with a view to settlement.

Mr. Benjamin, in giving evidence in this Application, produced the note-book kept by him when he officiated as Judge, and the following entry, dated 8th November, 2603 (1943) appears therein :—

> The parties came into my Chambers for settlement and both parties were heard and agreed to certain terms which were indicated to Counsel for each party who undertook to put the consent order into writing.

With regard to this entry, Mr. Benjamin, in his evidence, explained that both parties, without their Counsel, were called into his Chambers on 8th November, 1943, and that after hearing them he came to certain conclusions regarding the terms of settlement, which he put to both parties and to which they agreed. After that Mr. Benjamin called in Counsel for both parties and informed them of the terms of settlement. Counsel indicated to him that they would put the terms of settlement into writing. At 3 p.m. the same day the Civil Suit was called on again in Court, and immediately Counsel for the plaintiff (Applicant herein) objected regarding the terms of settlement It is thus clear that this Counsel took the very first opportunity to raise an objection. Counsel's objection is recorded by Mr. Benjamin in his note-book as follows :—

> My client says that he has not had a fair hearing during the discussion regarding the settlement. I am instructed that he represented certain matters before Your Lordship, and that Your Lordship told him it is a closed book. That being the case that he is dissatisfied with the order made by Your Lordship. My client says that he bowed to it. That being the case it is desirable that the case should proceed and if it does proceed another Judge should hear this case in view of the circumstances that have arisen and in the interests of justice.

Counsel for the defendant (Respondent herein) submitted to Mr. Benjamin that the terms of settlement should stand. Mr. Benjamin made no order in the Civil Suit on the 8th of November, 1943, nor at any other time; he adjourned the case on that date. His note regarding this is as follows :—

> Adjourned to a date to be fixed by the Registrar and in the meanwhile I will see the C.J. re the order.

In reply to a question by me Mr. Benjamin stated that since he had made no order, the last seven words of that note should more correctly read—"see the Chief Justice regarding the case". The Chief Justice referred to was the Japanese Chief Justice. Mr. Benjamin said that the reason for this was that he wished the Japanese Chief Justice to appoint another Judge—a local person not a Japanese—to re-hear the Civil Suit. He went on to say that so far as he was concerned he had finished with the Civil Suit. Accordingly it is clear from his evidence and from his notes made at the time that when he adjourned the case on 8th November, 1943, no order had been made by him. Mr. Benjamin took no further part in the Civil Suit nor can he say what happened regarding it afterwards. His evidence on this is as follows :—

> So far as I know the Japanese Chief Justice handed the matter over to Mr. Toda.

Mr. Toda was a Japanese Judge. There are no Court records of what happened before him, and the only information available about this phase of the Civil Suit is contained in affidavits filed in this Application.

It is common ground between the Applicant and Respondent that their respective Counsel, and not they themselves, saw Mr. Toda several times between the 19th and 27th April, 1944. The Applicant and the Respondent differ in their versions as to what happened before Mr. Toda, but as neither of them was present before him, they can only state what they were told by their respective Counsel.

Counsel for the plaintiff in the Civil Suit (Applicant herein) has filed an affidavit in which he states :—

> In the discussions with Mr. Toda which took place between the 19th and the 27th April, 1944, I suggested to Mr. Toda that third parties might be asked to arrange a settlement but such a request was refused by him. I did not consider myself a free agent to advise my client on the settlement and it was impossible to contemplate the consequences that would have befallen me and my client had the terms of settlement imposed by Mr. Toda been refused.

In the Applicant's affidavit it is stated :—

> My Counsel Mr. Khoo Teik Ee was apprehensive of the consequences of the non-acceptance of the terms of settlement put forward by Mr. Toda, and as the outcome of pressure improperly exercised by the Japanese Judge and out of fear I had no alternative but to accept the settlement initiated and imposed by the Japanese Judge.

It is stated by the Respondent in his affidavit :—

> I admit that Counsel for both parties were called to interview the Japanese Judge and that they saw him more than once. I was then informed by my Counsel, S. M. Yong, and I have since had it confirmed by him that during all the occasions the Japanese Judge was trying to persuade my Counsel to give up something more in favour of the Applicant and any pressure that was brought to bear was brought upon me and my Counsel.

No affidavit has been sworn by Mr. S. M. Yong, Counsel for the Respondent refuting the allegations set out in the affidavit of Mr. Khoo Teik Ee, although Mr. Yong is still practising in Kuala Lumpur.

The final act in the Civil Suit was the issue on or about 3rd August, 1944, of an order signed by the Registrar and dated the 8th November, 2603 (1943), which purports to be a consent order made by Mr. Benjamin on that date.

That order was issued by the Registrar as a result of a minute sent to him by Mr. Benjamin, 5th May, 2604 (1944) which reads as follows :—

> R.S.C.,
>
> The parties in this case appeared before Mr. Justice Toda. They have agreed to a consent order on certain terms. The Counsel will be submitting draft order.
>
> (Intd.) K.K.B.

Mr. Benjamin said he wrote that minute on information received from Mr. Toda.

It is thus clear that the consent order dated 8th November, 1943, which on the face of it purports to be a consent order made by Mr. Benjamin in his capacity as a Judge, is nothing of the kind. It is an order made by Mr. Toda, the Japanese Judge, issued under the guise of being an order made by Mr. Benjamin.

Accordingly, on the above facts I find that the following irregularities have taken place in the Civil Suit :—

(1) The parties to the Civil Suit, both of whom had instructed and were represented by Counsel were called into Chambers by Mr. Benjamin, who was officiating as a Judge, without their Counsel being available to them, when terms of settlement were discussed and decided upon. This is tantamount to depriving a litigant of the services of his Counsel at a very important stage in a case. It offends against the principle laid down in the case of *Moscati v. Lawson*[1] that if Counsel is instructed he ought to have control over the case and conduct it throughout.

(2) That the consent order dated 8th November, 2603 (1943), which is stated therein to have been made by Mr. Benjamin, was not made by him. It is issued under that guise, but was in fact made by the Japanese Judge Mr. Toda. It is therefore not a true order.

These two irregulaties themselves are sufficient grounds for setting aside the Japanese decree dated 8th November, 2603 (1943) in the Civil Suit, under section 3 (4) (d) of the Japanese Judgments and Civil Proceedings Ordinance, 1946.

In addition, I accept the sworn statement of Mr. Khoo Teik Ee, Counsel for the plaintiff in the Civil Suit (Applicant herein) that he only agreed to the consent order proposed by Mr. Toda because he was afraid of what would happen to himself and the plaintiff if he did not consent. I therefore find that the consent given was involuntary. This is sufficient ground under section 3 (4) (a) of the Japanese Judgments and Civil Proceedings Ordinance, 1946, to set aside the said Japanese decree.

There will accordingly be an order that the Japanese decree dated the 8th of November, 2603 (1943) in Civil Suit No. 18 of 2603 (1943) be set aside. Costs of this Application to the Applicant.

Order Accordingly.